IN THE

Supreme Court of the United States

October Term, 1965.

No. 442.

ANDIMO PAPPADIO, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107
Counsel for Petitioner.

Of Counsel:
LAURITANO, SCHLACTER
& SCHNEIDER,
205 West 34th Street,
New York, N. Y.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

CITATIONS.

Cases: Page

CITATIONS (Continued).

Constitution, Statutes and Rules: Page

Miscellaneous:

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 442.

ANDIMO PAPPADIO,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the district court (R. 71a-78a) is reported at 235 F. Supp. 887, and the majority and dissenting opinions in the court of appeals (R. 220-226) are reported at 346 F. 2d 5.

JURISDICTION.

The judgment of the court of appeals was entered on May 24, 1965 (R. 227). Petitions for rehearing were denied on June 21, 1965 (R. 228, 229). On July 6, 1965, Mr. Justice Harlan granted an extension of time, to and including August 19, 1965, for filing a petition for a writ of certiorari (R. 229). The petition for a writ of certiorari was filed on August 10, 1965, and granted on November 15, 1965 (R. 230), 382 U. S. —. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Constitution of the United States:

Article III, § 2, Par. 3 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *

18 U. S. C. 1 provides:

> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than $500, or both, is a petty offense.

18 U. S. C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 3771 provides:

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All

laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Criminal Procedure involved:

Rule 1 provides:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 2 provides:

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7 provides:

Rule 7. Indictment and the Information.

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or

by information. An information may be filed without leave of court.

Rule 42 provides:

Rule 42. Criminal Contempt.

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judges and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in sub-division (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT.

A grand jury in the United States District Court for the Southern District of New York was impaneled in September 1963, and subsequently began an investigation into possible violation of the Federal Narcotics Laws, referred to in 18 U. S. C. § 1406. On his first three appearances before the Grand Jury, petitioner refused to testify on the ground of self-incrimination. There was then pending in the Southern District of New York an indictment against petitioner, returned in 1958, charging him with conspiracy to violate the narcotics laws (R. 11a).

The Government, without moving to dismiss the indictment, which is still pending, undertook to have petitioner granted immunity, pursuant to § 1406, for any transaction or matter about which he was compelled to testify. Statutory immunity was granted (R. 116a).

Thereafter, petitioner again appeared before the Grand Jury and testified. He answered over 125 questions (R. 170a-214a). In the course of interrogation, the prosecutor put a carefully prepared question:

> "So that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that one of these alleged illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group—

"Now, what we're attempting to do is to find out whether or not these allegations are true or false. Are these allegations true?" (R. 174a-175a)

Petitioner responded:

"I am not a member of this group, if they exist I have no knowledge if there is a group. I do not deal in narcotics. I do not know if Mr. Lucchese deals in narcotics and I do not know if anybody else in this room or out of this room is dealing with narcotics." (R. 175a)

The Government also asked petitioner before the Grand Jury the following questions:

"Q. Mr. Pappadio, I'm now going to ask you some of the questions that Judge Herlands directed you to answer the time you were before him prior to today. The first one is this, Mr. Pappadio —At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting?"

[Petitioner answered, "No, sir."]

"Q. Do you know of such a meeting?" [He answered, "No, sir."] "Q. Do you know Rocco Mazzie?" [Petitioner answered, "No, sir."] (R. 214a)

Petitioner thus flatly denied, under oath, subject to the pains of a perjury prosecution, statements which he had been told were given to the Government. Petitioner denied, unconditionally, any knowledge about or complicity in illegal narcotics activities, the sole subject under investigation by the Grand Jury.

Petitioner answered all other questions put to him, until the prosecutor began to inquire about conferences between petitioner and attorneys (178a). These petitioner declined to answer, and the machinery was set in motion for this contempt proceeding.

After some further questioning had elicited the facts that petitioner knew Thomas Lucchese, and had previous contact with him, the prosecutor began to inquire about conferences where Lucchese, petitioner, attorneys and other persons had been present (R. 178a). Petitioner refused to answer, relying at first on the attorney-client privilege (R. 178a-183a). Later, having been allowed to consult with counsel, he expanded his objection to the First, Fifth, and Sixth Amendments (R. 183a-189a). The Government sought the aid of the District Court, and the Court directed petitioner to answer the questions (203a-209a). After the District Judge had withdrawn from the grand jury room, petitioner again declined to testify about his meetings with counsel (R. 210a-212a).

These questions were unanswered:

(1) "Mr. Pappadio, who were the attorneys who were present at these meetings?" (R. 210a);

(2) "Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese?" (R. 210a);

(3) "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" (R. 210a);

(4) "All right; how many of such meetings were there?" (R. 211a);

(5) "Where did the meetings take place?" (R. 212a)

It is relevant to note that, with respect to the fourth question, petitioner did answer at an earlier stage (R. 178a).

On the following day, the Government moved for an order that petitioner show cause why he should not be held in contempt (R. 4a-6a). The order was issued (R. 3a), and the matter came on for hearing before William B. Herlands, D. J. Petitioner's sworn answer (R. 7a-10a) recited the pending indictment outstanding against him and, further, the assertion by counsel for the Government that they had received information that petitioner was a member of a group engaged in illegal narcotics traffic. The answer pointed to petitioner's unequivocal denial of these charges before the Grand Jury and averred that petitioner has been and is in consultation with attorneys and prospective witnesses with respect to the indictment:

> "To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel." (R. 9a)

The answer also indicated that petitioner had consulted with attorneys on the possible perjury proceedings that might be brought as a result of his testimony.

The answer further stated that petitioner was aware and believed that he has been the subject of surveillance, including electronic eavesdropping, by federal and local officials. Additional surveillance with

respect to his attorney and witnesses would substantially impair and prejudice his ability to defend himself (R. 9a).

In addition to matters of privilege, the answer asserted that the questions he had declined to answer were not pertinent to the subject under inquiry by the Grand Jury. The subject had not only been announced to petitioner, but it had been the basis upon which the order granting immunity under § 1406 had been obtained.

A hearing was had before the District Court on October 28, 1964. At the outset a motion for a jury trial was made and denied (R. 34a). The Government stipulated that an indictment is now pending in the United States District Court for the Southern District of New York against the petitioner for violation of the narcotics laws (R. 61a). The Government further stipulated that it has statements to the effect that the petitioner was involved as a member of a group engaged in illegal activities and that there was testimony in a case that the petitioner was involved in narcotics (R. 59a-60a).

The Assistant United States Attorney told the District Court that the outstanding indictment against petitioner was not on the trial calendar, since with respect to the other defendants who did stand trial the case was still in the appellate courts (R. 62a). The petitioner had been severed from that trial (R. 60a). The Government stated that "the case is not presently on the trial calendar" (R. 61a).

At the hearing counsel for the petitioner argued that the petitioner's having had answered many questions and having refused to answer only four or five questions was relevant to the issue of willfulness (R.

54a); that the questions asked of the petitioner were not material and relevant (R. 55a); that he was facing a prosecution for perjury for which he has no immunity (R. 56a-57a); and that requiring petitioner to answer questions involving or relating to meetings with attorneys and the persons present at these meetings violates his rights under the First and Sixth Amendments (R. 57a-58a).

Counsel for petitioner had argued previously that the Government had no right to call petitioner as a witness before the Grand Jury since he was under indictment (R. 139a-142a). The District Court then ruled that this argument was without merit (R. 142a-144a).

The petitioner placed into evidence the outstanding indictment against him (R. 11a-20a, 60a). From the record of a previous trial of other defendants under that indictment, petitioner introduced the transcript of the testimony by a witness for the Government stating that petitioner had been present at the meeting (R. 21a-32a, 59a-60a).

The District Court took the matter under advisement and adjourned the hearing for two days until October 30, 1964. On that date, the petitioner was adjudged guilty of criminal contempt of court and sentenced to a term of imprisonment of two years. The sentence further provided that if the petitioner answer the questions as directed prior to expiration of the sentence or discharge of the Grand Jury, whichever first occurs, further application may be made to the court to reconsider the sentence (R. 76a, 78a). This Grand Jury was discharged in March of 1965.

The District Court refused to grant bail pending appeal on the ground that "the appeal would be frivolous and would be taken for delay" (R. 2a, 84a-85a).

Petitioner surrendered to the United States Marshal and served twenty days in prison until released by order of the Court of Appeals on the day of argument in that court.

The majority of the court below sustained the sentence of two years for criminal contempt stating that the "*Barnett* dictum" does not apply where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. Judge Medina agreed with the majority on all points except that the sentence to a period of two years' imprisonment was in his opinion "too much" and that he would reduce the sentence to one year (R. 226).

SUMMARY OF ARGUMENT.

I.

The right to a trial by jury is a basic and fundamental feature of our system of federal jurisprudence. Petitioner was sentenced to two years' imprisonment by a district judge without the benefit of a jury trial which petitioner had demanded. Article 3, § 2 of the Constitution, which provides that the trial of all crimes *except* in cases of impeachment shall be by jury does not make any exception for criminal contempt; neither does the Fifth Amendment, which provides that no person shall be held to answer for an infamous crime *except* in cases arising in the land or naval forces. The Sixth Amendment, which provides that in all criminal prosecutions the defendant shall have the right to be tried by an impartial jury, does not *except* criminal contempts. Clearly there is no provision in the Constitution that states that a criminal contempt is not a crime.

There is no valid historical basis for the assumption that the Constitutional draftsmen believed that criminal contempt that was committed outside of court was subject to punishment by the exercise of a court's summary jurisdiction. Quite the contrary. Modern history research has exposed the "historical error." However, regardless of what might have been the previous practice of trying a contempt committed in the presence of the court, *Harris v. United States,* decided by this Court on December 6, 1965, now makes it clear that a right to jury trial is wholly inapposite for such contempts. Where speedy punishment may be necessary in order to vindicate the court's dignity and authority a trial by jury may be dispensed with under those circumstances. But it follows that where swift-

ness is not a prerequisite of justice that there is no necessity of dispensing with a jury.

The establishment of jury trial will provide protection for defendants without limiting the use of contempt power by the court to protect *itself* against contempts occurring in the courtroom. The slight delay because of a jury trial of issues of fact in a contempt hearing would *not* interfere with the courts' use of contempt power.

If this Court does not desire to rest on Constitutional grounds a determination that an unqualified right to jury trial exists on charges of criminal contempt not committed in the presence of the court, it may by virtue of its supervisory power over the inferior federal courts establish safeguards against the tendency of the arbitrary exercise of the contempt power by those judges. Obviously the most significant safeguard would be the right to jury trial.

II.

The district court was without authority to sentence petitioner for criminal contempt summarily, to a term of imprisonment in excess of six months. This limitation is derived from the fact that punishment upon a summary trial is constitutionally limited to that penalty provided for petty offenses. *United States v. Barnett,* 376 U. S. 681, 694-695 n. 12, decided on April 6, 1964. There is no merit to the Government's contention that the above *Barnett dictum* lacks historical support as a Constitutional rule. Obviously there must be serious doubt about the Constitutional validity of sending people to a penitentiary for two years without affording them a trial by jury. But since this Court can create for federal courts a standard or limitation under

its supervisory power that is fully adequate to answer any challenge to the legitimacy of the *Barnett* rule it should not be disturbed. The *Barnett* rule raises no particularly perplexing problems since it is no more difficult to administer that rule than the rule that limits federal courts and their jurisdiction to cases where a specified dollar amount is in controversy. Every lower court that has considered the *Barnett* rule has accepted and applied the limitation except the courts in the Second Circuit.

III.

Even if a sentence of two years could be imposed for a criminal contempt without a trial by jury, there was in this case a flagrant abuse of discretion in sentencing this petitioner to such a prison term. Petitioner had answered over 125 questions out of the 129 or 130 that he had been asked. He was a cooperative witness before the Grand Jury. His refusal to answer the four or five questions was non-willful and based, not without justification, on the belief that the answers to these questions would prejudice his defense against his outstanding indictment and a probable prosecution for perjury for which he would have no immunity. Unlike the witness who refuses to give answers to any questions except his name and address, petitioner fully cooperated with the Grand Jury except only when the few questions on which Government was quite willing to terminate him as a witness before the Grand Jury because of his refusal to answer these questions. There was here no "brazen refusal to cooperate with the Grand Jury." The record clearly reveals that this is a fitting case where "only nominal punishment if any is indicated." *Harris v. United States.*

ARGUMENT.

I.

On this serious charge of criminal contempt outside the presence of the court, petitioner was entitled to trial by jury.

A. The Constitutional Basis.

Most of this Court's early statements negativing a right to jury trial in *all* contempt cases preceded the discovery that they rested upon an historical error, or were "shrouded in much obscurity." Two recent decisions have faced the issue with the benefit of the scholarship that brought the fallacy to light. In *Green v. United States,* 356 U. S. 165, notwithstanding the exposure of the historical error,[1] this Court reiterated that there is no right to a jury trial in *all* criminal contempt cases, even though the petitioners there had not contended that they were entitled to a jury trial, 356 U. S. at 187. More recently, in *United States v. Barnett,* 376 U. S. 681, the Court denied a claimed right to jury trial, substantially relying upon *Green.* The "historical error" has therefore not been enough, by itself, to persuade the Court to consider the question free from the chain weight of precedents.[2]

1. The majority of the Court held "We are told however that the decisions of this Court denying the right to jury trial in criminal contempt proceedings are based upon an 'historical error' reflecting a misunderstanding as to the scope of the power of English courts at the early common law to try summarily for contempts, and that this error should not here be extended to a denial of the right to grand jury. But the more recent historical research into English contempt practices predating the adoption of our Constitution reveals no such clear error and indicates if anything that the precise nature of those practices is shrouded in much obscurity." 356 U. S. at 185.

2. The opinion of the Court in *Green,* rejecting the force of the argument based upon the demonstrated historical fallacy, explicitly combined both kinds of contempt; ". . . it at least seems clear that English practice by the early Eighteenth Century comprehended the

However, this Court's recent decision in *Harris v. United States,* No. 6, October Term, 1965, undermines the holdings of *Green* and *Barnett,* that a jury trial is not required in *all* criminal contempts outside the presence of the court. Both cases had treated as a single class all criminal contempts, whether in the presence of the court or not. The clear determination in *Harris* that there are not one, but two distinct classes of contempt, *to be treated separately,* represents a major development. Added to the established historical error that has so long clouded this aspect of the law of contempt, the *Harris* decision presages the plenary consideration by this Court for the first time of the powerful arguments that have been advanced in support of the right to jury trial in prosecutions for criminal contempt not occurring in the presence of the Court.

Harris makes clear that a right to jury trial is wholly inapposite for contempts in the presence of the court. "[S]peedy punishment may be necessary in order to achieve 'summary vindication' of the court's dignity and authority." Trial by jury would interfere considerably with the necessity for such summary vindication. But, *Harris* now establishes, in dealing with other contempts "swiftness [is] not a prerequisite of justice." There is in such cases no compelling urgency that warrants dispensing with normal deliberative processes. It is reversible error to disguise a contempt case that does not require summary vindi-

use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside court." 356 U. S. at 185. The opinion of the Court discusses throughout, as a single category, all criminal contempts. Mr. Justice Frankfurter, whose concurrence was crucial to the disposition in *Green,* wrote a separate opinion that spoke in the *singular* of the "power to punish for contempt" and indiscriminately cited the long line of contempt cases involving both kinds of contempts. The analysis of the Court in *Barnett* explicitly rests upon and extends the determination in *Green.*

cation of the court's dignity and authority as a contempt in the presence of the court. In such cases, *Harris* holds, orderly processes must and should be followed.

Harris' shattering of the lump concept of criminal contempts renews the issue, which ought to be decided free from the distorting coloration of cases involving contempts directly affronting judicial dignity and authority.

The arguments on the merits to support a determination that right to jury trial exists, where the charge is criminal contempt outside the presence of the court, have been fully explored, especially in the opinions of the dissenting Justices in *Green v. United States,* 356 U. S. 165, 193-219, and *United States v. Barnett,* 376 U. S. 681, 725-726. See, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendants' Rights,* 65 Yale L. J. 846 (1955). It would be a work of supererogation to repeat here what has been canvassed so soundly and persuasively in those opinions. A few observations, however, may be pertinent.

Article III, section 2, paragraph 3 of the Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ." In making the exception, the Framers did not provide for criminal contempt.[3] The Fifth Amendment provides

3. In *Gompers v. United States,* 233 U. S. 604, 610-611, Justice Holmes stated: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way." See also Frankfurter and Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1042, 1046 (1924).

that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or Naval Forces, when in actual service, in time of war or public dangers; . . ." There is no exception expressed in this Amendment for criminal contempt. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." On the *face* of the Constitution, the right to trial by jury in criminal contempt cases seems assured.

The Government has had prepared an elaborate study of the practice in contempt cases in colonial courts; this study was submitted to the Court as an Appendix to the United States' brief in the *Harris* case, and the brief relies heavily on the supposed findings of that survey. Apart from its difficulty of differentiating clearly between civil and criminal contempt cases, the Government's study follows the now discredited theory that all criminal contempts are of one kind. Stripped of the cases involving contumacious behavior in the presence of the court, the survey is hardly supportive of the Government's argument. Indeed the Government in its brief in the *Harris* case does not refer to one case where a colonial court tried a defendant without a jury for disobedience of an order outside the presence of the court.

No logical argument can justify denial of a trial by jury in modern criminal contempt proceedings. It must be conceded that the recent practice of district courts is a substantial departure from the past. This Court noted in *Barnett* that "It does appear true that since 1957 the penalties imposed in cases reaching

this Court have increased appreciably." 376 U. S. at 694-695. Within the last year, federal courts in the Southern District of New York have imposed at least four sentences of two years' imprisonment.[4] The *Green* case involved a sentence of three years. In a recent Fifth Circuit case the district judge sentenced a recalcitrant witness to five years; he later reduced that to three years prior to appeal. *Johnson v. United States,* 344 F. 2d 401 (5th Cir. 1965).

The Government points out in its *Harris* brief that, in considering the severity of sentences actually imposed, "it is, of course, necessary to bear in mind the significantly different attitude taken in colonial times to the question of imprisonment . . ." (p. 49). No amount of such rationalization can possibly relate harsh sentences of two, three or five years in prison to the practice in colonial times. Nor will they fit into or even be close to the pattern of cases through the Nineteenth and first half of the Twentieth Century.[5]

The Government brief in *Harris* ultimately attempts to justify the denial of the Constitutional right to jury trial to persons charged with such serious crimes on the ground of "policy" (p. 59). To the extent that the Government is not addressing itself to contempts in the presence of the court requiring speedy vindication of the court's dignity and authority, its argument rings with a familiar, hollow sound. The Government advances a baseless claim of necessity:

4. *United States v. Bialkin,* 331 F. 2d 956 (2d Cir. 1964), execution of sentence suspended; *United States v. Castaldi,* 338 F. 2d 883 (2d Cir. 1964); *United States v. Shillitani,* 345 F. 2d 290 (2d Cir. 1965); and the present case.

5. See, *e.g., United States v. Shipp,* 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a prisoner in flagrant violation of its order that custody of the prisoner not be disturbed pending review of his conviction.

arbitrary judicial power is deemed necessary in the interest of efficiency and to prevent independent juries from interfering. Livingston in his work on criminal procedure in 1873 wrote:

> "Not one of the oppressive prerogatives of which the crown has been successively stripped in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation."

The principle of expedience on which the Government relies would equally apply to every single guarantee in the Bill of Rights. One of the most precious elements of the right to trial by jury is that it does interfere with the swift and efficient dispatch of acts of tyranny. That protection,[6] as a matter of "policy," is worth far more than any incidental costs that the institution may involve.[7]

B. The Non-Constitutional Bases.

It is not necessary for this Court to rest on Constitutional grounds a determination that an unqualified right to jury trial exists on charges of criminal contempt not committed in the presence of the court. Such a conclusion clearly can be reached in reliance upon this Court's established supervisory power over

6. Compulsory process and assistance of counsel; right to a public hearing; the benefit of a statute of limitations; the proof of guilt beyond a reasonable doubt and freedom from compulsion to testify, are some of the protections that have traditionally been associated with criminal offenses admittedly apply to criminal contempts. Thus, it does not require a radical shift in judicial doctrine to now state that jury trials are required for criminal contempts committed outside the presence of the courtroom especially where the sentence of imprisonment is two years.

7. The fact that a jury trial would be available to a defendant in criminal contempt case does not mean that it would be availed of in all cases. It is a fact that most people do plead guilty to criminal offenses that have been prosecuted by either indictment or information.

the lower federal courts. See *McNabb v. United States*, 318 U. S. 332. Especially in light of the indications that lower court judges have recently begun to view their unbridled power in contempt cases as permitting more and more severe penalties, it is fitting to establish safeguards against the dangers of arbitrary exercise of that power. The most significant safeguard is the right to jury trial.

A further ground for affirming the right to jury trial can be gleaned from the interaction of Rule 42(b) of the Federal Rules of Criminal Procedure and relevant sections of the United States Code. Rule 42(b) provides that a defendant is entitled to a trial by jury "in any case in which an act of Congress so provides." Under 18 U. S. C. § 1, "any offense punishable by death or imprisonment for a term exceeding one year is a felony." As in this case, and others cited above, criminal contempts can be and are punished by imprisonments for terms exceeding one year. By the statutory definition, such offenses are felonies. Rule 7(a) of the Rules of Criminal Procedure (which have the authority of law under 18 U. S. C. § 3771), guarantees indictment by a grand jury in such offenses. If a grand jury is assured, *a fortiori* a defendant in such a case is entitled to trial by a petit jury.

II.

Since the contempt charge against petitioner was a serious one, punishable by imprisonment in excess of six months, petitioner was entitled to trial by jury.

To assert that the guilt or innocence of any person who is punished by a sentence of imprisonment for two years should be decided by a jury does not seem to be unreasonable. While *United States v. Barnett*,

376 U. S. 681, rejected the proposition that a Constitutional right to jury trial exists in *all* criminal contempt cases, the Court stated that such a right to jury trial does apply where a penalty greater than six months is contemplated.[8] Although the declaration was contained in a footnote to the opinion of the Court, and was denominated *dictum*, it was expressly added for the guidance of lower courts in the "effective administration of justice." Under this rule of the *Barnett* case, petitioner's conviction must be reversed. The Government in the *Harris* case, *supra*, sought to have this Court repudiate this dictum.

Two points may be noted concerning the rule announced in *Barnett*. The declaration expressly refers to a Constitutional limitation as underlying the Court's concern, but the precise limitation to the penalty provided for petty offenses need not be sought purely in Constitutional doctrine. On several occasions, this Court has exercised its supervisory power over lower federal courts to fashion limitations that will avoid confrontation of difficult Constitutional questions. See *McNabb v. United States*, 318 U. S. 332.

The second point concerns the interpretation to be given to the Court's utilization of the penalty for petty offenses as the standard to govern criminal contempts that may be summarily tried. In 18 U. S. C. § 1(3), a petty offense[9] is defined as any misdemeanor,

8. "In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U. S. at 696 n. 12. This *dictum* could only have been written in the opinion because a majority of the Court subscribed to it.

9. In *Schick v. United States*, 195 U. S. 65, this Court decided that there was no Constitutional requirement that petty offenses be tried by jury. See also, *District of Columbia v. Clawans*, 300 U. S. 617.

the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both.

Unless this Court is now to retreat from the principle recently adopted in *Barnett,* petitioner's conviction must be reversed. Petitioner, unlike the petitioner in *Harris,* sought and was denied trial by jury on the charge against him (R. 34a). He was summarily tried and sentenced to two years' imprisonment—twice as long as *Harris*— well in excess of any penalty contemplated for petty offenses.

In *Harris v. United States, supra,* the Government launched a full scale attack on the *Barnett* decision. It is appropriate here to assay the quality of the Government's arguments.

First, the Government had sought to demonstrate that, in colonial times, authorized punishment for criminal contempts occasionally exceeded that authorized for petty offenses. As noted above, the Government's survey is contaminated by its erroneous premise that all criminal contempts, whether or not in the presence of the court, are of a single class. It is, therefore, clearly inapposite to the limitation fashioned by this Court in *Barnett.* The Government has failed to demonstrate that the definition of petty offenses in current federal law bears any relation whatsoever to the crimes that the Government describes as petty offenses in the colonies. The dynamics of criminal law in colonial times manifestly are far different from the situation today, as the Government itself recognizes in its argument that "it is, of course, necessary to bear in mind the significantly different attitude taken in colonial times to the question of imprisonment . . . ." (p. 49). The significantly different attitudes taken in colonial times are equally likely to affect

the meaning of petty offenses, no matter how the Government defines them for that era.[10] The Government's historical argument against the *Barnett* rule thus founders on the patent fallacy of comparing non-equivalents.

While the Government seeks support for its argument against the Constitutional basis for the *Barnett* rule in colonial history, it never deals with the relevant history of the place of criminal contempts in the federal courts prior to the past decade. Only in recent years have the lower federal courts manifestly departed from the practice of treating criminal contempts within the perimeters of petty offenses. It is that departure that has led to the sharpened awareness and concern for the limitations that the Constitution places upon the power of judges to imprison summarily.

The shortest answer to the Government's argument that the *Barnett* rule lacks firm historical support as a Constitutional rule is that such support is unnecessary. Plainly there is serious doubt about the Constitutional validity of imprisoning a man for two years without affording him trial by jury. On the basis of that doubt, this Court can create for federal courts a standard or limitation that obviates or minimizes the concern. This Court's supervisory power is fully adequate to answer any challenge to the legitimacy of the *Barnett* rule.

In *Harris v. United States,* the Government advanced a further argument against the *Barnett* rule, an argument that presumably would apply whether the

10. The Government never makes totally clear how it is classifying "petty offenses" in colonial times. It appears, however, that they rely on what the colonial legislatures *called* petty offenses (p. 53) or on offenses triable by a justice of the peace (pp. 52, 53, 54). Indeed, the Government excludes from its analysis offenses triable by two or more justices of the peace en banc (pp. 54, 55 and n. 15).

rule is grounded on the Constitution *vel non* or on this Court's supervisory power. The Government argued that the rule was administratively unworkable and raises "particularly perplexing practical problems" (p. 63). Reading this argument, one finds it difficult to decide whether the Government is being petulant or merely fanciful.

The Government obstinately blinds itself to the fact that the decision whether to accept the ceiling on permissible punishment under the *Barnett* rule, for contempts committed outside the presence of the court, will be made by the prosecutor or aggrieved party unless the defendant insists on his right to trial by jury. The judge will not have to decide "in the dark" (p. 63). Nor will the outcome be the result of "blind chance." In a case such as this, if the Government wants to seek a penalty greater than the *Barnett* rule permits in summary trial, it will ask the court to impanel a jury and can advise the court of the reasons it seeks the more severe sanctions. The effort of the Government to create the impression that, for contempts committed outside the presence of the court, the onus is on the court to initiate the contempt proceeding and to determine without any information the appropriate procedure, is a distortion that bears no resemblance to reality.

The *Barnett* rule raises no particularly perplexing practical problems. It is no more difficult to administer than the rules, completely familiar to federal courts, that limit their jurisdiction to cases where a specified dollar amount is in controversy. The fact that, on occasion, a jury may be impanelled in a case that leads to a conviction and sentence less than the ceiling that might have been imposed in summary trial is a prospect that should not be disturbing to anyone.

The converse possibility that the prosecutor will fail to realize the seriousness of a contempt in advance of prosecution is so difficult to imagine as to be unworthy of consideration.

The *Barnett* rule as a rule of Constitutional law is well grounded in history and purpose. As an exercise of this Court's supervisory power,[11] it is beyond challenge. The objections made on the ground of practicality are frivolous. It is submitted, therefore, that the Court should not reverse the *Barnett* decision that punishment for criminal contempt by summary trial without a jury be limited to that penalty provided for petty offenses.[12]

III.

Assuming arguendo that a sentence of two years may be imposed for a criminal contempt without a trial by jury, there was clear abuse of discretion in sentencing petitioner to such a prison term.

If petitioner's prior arguments, that the Constitution guarantees trial by jury in all charges of criminal contempt outside the presence of the court, and that a sentence in excess of six months cannot be imposed after denial of a request for jury trial in a criminal contempt proceeding, are rejected, petitioner's conviction would not be reversed. In that event, petitioner submits that his sentence is grossly excessive and ought

11. Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

12. Every lower court that has considered the *Barnett* rule, with the exception of the courts in the Second Circuit, has accepted and applied the limitation. See *Rollerson v. United States*, 343 F. 2d 269 (D. C. Cir. 1964); *Randazzo v. United States*, 339 F. 2d 79 (5th Cir. 1964); *Johnson v. United States*, 344 F. 2d 401 (5th Cir. 1965); *United States v. Schiffer*, 351 F. 2d 91 (6th Cir. 1965). See also *In re Holland Furnace Co.*, 341 F. 2d 548 (7th Cir. 1965) (*Barnett* limitation applied in fact.)

to be reduced by this Court for abuse of discretion by the trial court.

The sentence imposed against petitioner is one of the longest and most severe penalties ever assessed in a criminal contempt proceeding that has come before this Court for review. Except for the recent rash of such sentences in the federal courts in the Southern District of New York, with the approval of the Court of Appeals for the Second Circuit,[13] such a harsh penalty is virtually unheard of in the federal system. The contrast between the two-year sentence against petitioner and the sentences of this Court in *United States v. Shipp,* 214 U. S. 386 and 215 U. S. 580, is striking. For lynching a prisoner in flagrant disregard of this Court's order staying his execution pending review of his conviction, this Court imposed sentences of sixty and ninety days.

Petitioner's contempt, if such it be, is not deserving of a sentence of imprisonment for two years, or indeed any period of imprisonment. Unlike this Court's characterization of *Green v. United States, supra,* the contempt here was not "by any standards a most egregious one." 356 U. S. at 188. His action cannot be described as a "brazen refusal to cooperate with the grand jury." *Harris v. United States, supra.* Following conferral of statutory immunity, petitioner answered over one hundred and twenty-five questions! He was a cooperative witness before the Grand Jury, despite the fact that he was and still is a defendant in an outstanding 1958 indictment charging him with violation of the narcotics laws. That *his denials of involvement in illicit activities* may not have pleased the United States prosecutors, who said they already had sworn evidence to the contrary, does not alter the fact

13. See cases in note 4 *supra.*

that he was a cooperative witness, answering fully all the questions put to him.

Only when the interrogation turned to matters that petitioner believed to involve the pending indictment did he refuse to answer. Petitioner believed, we submit not without justification, that interrogation into his relations with counsel and witnesses threatened to prejudice the posture of his defense against the pending indictment. Petitioner believed, we submit not without justification, that the prosecution could not interfere with his right to counsel under the Sixth Amendment. Whether these concerns on the part of petitioner were legally valid is not the issue here, particularly since this Court's order granting certiorari excluded those questions. What is pertinent is that petitioner based his objections on serious and unresolved legal grounds.

Nothing more forcefully illustrates the *good faith attitude* of petitioner, *the converse of a brazen refusal to cooperate*, than the statement of the Assistant United States Attorney who was conducting the investigation that petitioner was not being willfully contumacious. Responding to petitioner's refusal to answer a question, the prosecutor said: "I'm assuming what you're saying to me you're saying in good faith. I'm also telling you that you have no right to decline to answer it" (R. 179a).

Petitioner not only feared the prejudice to his defense against the pending indictment, but he likewise feared that he was being whipsawed into a possible perjury prosecution. Petitioner had testified under oath that he was not involved in illegal narcotics activities either alone or as a member of a group. The Government claimed that it had sworn evidence to the contrary. Having contradicted this sworn evidence,

petitioner's concern for a perjury prosecution was not fanciful. Then the Government pressed for petitioner to testify about meetings he had attended with Lucchese. Even though such meetings may have been entirely innocent, others might interpret them differently. "[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege [against self-incrimination] serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Board of Education,* 350 U. S. 551, 557-558; see also *Grunewald v. United States,* 353 U. S. 391, 421. Petitioner reasonably might fear that further testimony about conferences with Lucchese would ensnare him in a perjury prosecution, which though unfounded, was nonetheless real. Again, the point is not presently whether petitioner's concern was validly grounded. Rather it is to demonstrate that petitioner was not simply refusing to answer by being willfully contumacious.

Petitioner also challenged the questions he declined to answer as not demonstrably pertinent to the announced subject of the Grand Jury investigation. This challenge rested on the plausible legal conclusion that the limitations that this Court has imposed on legislative inquiry by committees of Congress are also applicable to judicial inquiry by grand juries. See *Deutch v. United States,* 367 U. S. 456; *Watkins v. United States,* 354 U. S. 178. This was deemed the more true because, unlike legislative committees, this Grand Jury could not freely change or expand the subject under inquiry and still compel petitioner's testimony, which was extracted under the very limited scope of a particular immunity act, 18 U. S. C. § 1406.

This case thus concerns a witness who had answered over one hundred and twenty-five questions,

who refused to answer only four questions, whose refusal was described by the Assistant United States Attorney as in good faith, and whose refusal was based upon multiple, substantial legal objections of a serious nature. Such a case does not warrant a severe penalty. The typical witness who refuses to give answers to any questions except his name and address furnishes nothing to the appellate courts when he claims that the sentence was so excessive as to amount to an abuse of discretion.

Petitioner was not such a witness. If witnesses called before the grand jury are to receive the same severe maximum sentences whether they refuse to answer any questions or whether they have cooperated, as this petitioner has, witnesses in the future would be extremely reluctant to cooperate when not the slightest consideration is given them for answering practically every question that was asked.

The record discloses that the petitioner is fifty years old (R. 128a), that he lives in a house worth between $15,000 and $20,000 that is subject to a mortgage (R. 173a), that he is in the business of manufacturing ladies' coats (176a), that in the 1930's when petitioner was 18 or 19 years old he had pleaded guilty to violating the Federal Narcotics Law but that at a subsequent date he had stated that he had pleaded guilty because his lawyer had advised him and that he was in fact innocent, and that he had received a Presidential pardon (R. 83a, 108a, 154a), and that he has no other criminal record. The record also reveals that under oath petitioner stated that he is not a member of any criminal group, and that he does not deal in narcotics (R. 175a).

In *Green v. United States,* 356 U. S. at 188, this Court said:

> "We take this occasion to reiterate our view that in the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The 'discretion' to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising the sentences imposed."

No one can describe the action of the district court in this case as the exercise of "extraordinary power with the utmost sense of responsibility and circumspection." That power has been gravely abused and a revision of the sentence is imperative.[14]

The United States' brief in *Harris v. United States, supra,* having cited this Court's position in *Green* just quoted said (p. 65):

> "In the contempt area, therefore, there is no reason to fear that excessive uncorrectible punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court."

On the strength of that statement, we urge the Solicitor General to join with petitioner in requesting this Court to reduce petitioner's sentence to the time already served.

---

14. "[T]he intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed." *Cooke v. United States,* 267 U. S. 517, 538.

Twenty days of imprisonment have already been served, in part because the prosecution opposed release of petitioner on bail pending appeal despite the serious legal questions presented (R. 1a-2a). It is submitted that a twenty-day sentence is certainly more than adequate for the technical, non-willful contempt. Petitioner has been further burdened with the expense and anxiety of prosecuting appeals to two levels of appellate courts.[15]

We earnestly submit that this is a fitting case where "only nominal punishment if any, is indicated." *Harris, supra.* Unless this Court reverses the conviction outright for the reasons previously advanced, we ask that this case be terminated without further injury to petitioner.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce St.,
Philadelphia, Pa. 19107
Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER
& SCHNEIDER,
205 West 34th Street,
New York 1, N. Y.

DECEMBER 1965

15. Judge Medina, on the Court of Appeals below, found the sentence against petitioner "too long" (R. 226); he would have reduced it to one year.